

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

THOMAS W. ZACH,

Plaintiff,

v.

JERRY MARWITZ, STEVEN RHODE,
BRIAN DOMMISSE, RENEE SCHUELER,
KAREN GOURLIE, JODINE DEPPISCH
and JOHN or JANE DOE,

Defendants.

ORDER

13-cv-850-bbc

On May 14, 2014, I denied plaintiff Thomas Zach leave to proceed on his claims that defendants violated his First Amendment rights with regard to interfering with his mail or retaliating against him and dismissed this case for plaintiff's failure to state a claim upon which relief may be granted. Plaintiff then filed a motion for extension of time to file a notice of appeal. I granted plaintiff's motion in part and gave him a deadline of July 13, 2014 in which to file notices of appeal in cases 13-cv-850 bbc and 13-cv-851-bbc. Now plaintiff has filed a notice of appeal in this case. Because plaintiff has not paid the \$505 fee for filing an appeal, I construe his notice as a request for leave to proceed in forma pauperis on appeal.

It appears that the notice of appeal is untimely because it was filed on July 14, one day after the extended deadline passed. However, because only the court of appeals may determine whether it has jurisdiction to entertain an appeal, Hyche v. Christensen, 170 F.3d

769, 770 (7th Cir. 1999), I will go on to consider whether plaintiff may proceed in forma pauperis.

A district court has authority to deny a request for leave to proceed in forma pauperis under 28 U.S.C. § 1915 for one or more of the following reasons: the litigant wishing to take an appeal has not established indigence, the appeal is taken in bad faith or the litigant is a prisoner and has three strikes. Section 1915(a)(1),(3) and (g); Sperow v. Melvin, 153 F.3d 780, 781 (7th Cir. 1998). Plaintiff's request for leave to proceed in forma pauperis on appeal will be denied, because I am certifying that his appeal is not taken in good faith.

In Lucien v. Roegner, 682 F.2d 625, 626 (7th Cir. 1982), the court of appeals instructed district courts to find bad faith in cases in which a plaintiff is appealing the same claims the court found to be without legal merit. Lee v. Clinton, 209 F.3d 1025, 1027 (7th Cir. 2000). Plaintiff is trying to appeal the same claims on which I denied him leave to proceed. Because there is no legally meritorious basis for plaintiff's appeal, I must certify that the appeal is not taken in good faith.

Because I am certifying plaintiff's appeal as not having been taken in good faith, he cannot proceed with his appeal without prepaying the \$505 filing fee unless the court of appeals gives him permission to do so. Under Fed. R. App. P. 24, plaintiff has 30 days from the date of this order in which to ask the court of appeals to review this court's denial of leave to proceed in forma pauperis on appeal. With his motion, he must include an affidavit as described in the first paragraph of Fed. R. App. P. 24(a), with a statement of issues he intends to argue on appeal. Also, he must send along a copy of this order. Plaintiff should

be aware that he must file these documents in addition to the notice of appeal he has filed previously.

If plaintiff does not file a motion requesting review of this order, the court of appeals might not address the denial of leave to proceed in forma pauperis on appeal. Instead, it may require plaintiff to pay the entire \$505 filing fee before it considers his appeal. If plaintiff does not pay the fee within the deadline set, it is possible that the court of appeals will dismiss the appeal and order the court to arrange for collection of the fee from plaintiff's prison account.

Finally, in his notice of appeal plaintiff includes a request for appointment of counsel. Plaintiff's request for court assistance in the recruitment of counsel on appeal is not properly raised in this court. He will have to make his request directly to the Court of Appeals for the Seventh Circuit.

ORDER

IT IS ORDERED that

1. Plaintiff Thomas W. Zach's request for leave to proceed in forma pauperis on appeal, dkt. #13, is DENIED. I certify that his appeal is not taken in good faith. The clerk of court is directed to insure that plaintiff's obligation to pay the \$505 fee for filing his appeal is reflected in the court's financial records.

2. Plaintiff's request for court assistance in the recruitment of counsel on appeal, dkt.

#13, is DENIED without prejudice to his refiling it with the court of appeals.

Entered this 18th day of July, 2014.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge